

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

Before the Court is Defendant David Barton's Motion to Dismiss or in the alternative Transfer Venue (ECF No. 9). Plaintiff Wellosophy Corporation filed an untimely Response on June 30, 2011 (ECF No. 17).¹ Defendant did not file a Reply.

FACTS AND BACKGROUND

This suit arises from an alleged copyright infringement. Plaintiff is a Florida Corporation with its principal place of business in Florida. (Compl. ¶2, ECF No. 1.) Defendant Hero Nutrition is a limited liability company with its principal place of business in Utah. (Barton Decl. ¶4, ECF No. 9.) Defendant David Barton is a citizen of Utah. (*Id.* at ¶2.) Barton is a member and manager of Hero Nutrition. (*Id.* at ¶3.) Plaintiff alleges that Defendants operate an interactive website that promotes and sells products to Nevada residents. (Compl. at ¶19.) Plaintiff alleges that Defendants Hero Nutrition and David Barton reproduced an unauthorized copy of Plaintiff-owned content on the website www.myheronutrition.com. (*Id.* at ¶35.)

Plaintiff filed the instant suit on December 22, 2010. (*See* Compl.) The summons and complaint were served on Defendant David Barton and Hero Nutrition, LLC on January 26,

¹ The Court granted a stipulation to extend the date to file the Response to May 18, 2011 on March 21, 2011 (ECF No. 12). However there were no subsequent orders or stipulations extending the filing deadline.

1 2011. (See Summons Returned Executed, ECF Nos. 7 & 8.) Accordingly, Defendants had until
 2 February 16, 2011 to file an answer or a Rule 12 motion. Therefore it appears that Barton's
 3 Motion to Dismiss, filed on March 4, 2011 is untimely.² However, it appears that in the Ninth
 4 Circuit a Rule 12(b) motion to dismiss filed before a responsive pleading is timely. *See Aetna*
 5 *Life Ins. Co. v. Alla Medical Services, Inc.*, 855 F.2d 1470, 1474 (9th Cir.1988)("This circuit
 6 allows a motion under Rule 12(b) any time before the responsive pleading is filed.") Plaintiff
 7 did not object to Barton's untimely motion, therefore the Court will address it.

8 **DISCUSSION**

9 **A. Personal Jurisdiction**

10 A defendant may move to dismiss for lack of personal jurisdiction. Fed. R. Civ. P.
 11 12(b)(2). When a defendant raises the defense, the burden falls upon the plaintiff to come
 12 forward with sufficient facts to establish that jurisdiction is proper. *Boschetto v. Hansing*, 539
 13 F.3d 1011, 1015 (9th Cir. 2008). Personal jurisdiction over a nonresident defendant is
 14 established when a two-part test is satisfied. First, there must be personal jurisdiction under the
 15 laws of the state where it is asserted. *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1404 (9th
 16 Cir. 1994). Second, the exercise of jurisdiction must satisfy due process. U.S. Const. amend
 17 XIV, 1; *Chan*, 39 F.3d at 1404–05.

18 For a non-resident defendant, the assertion of jurisdiction is constitutionally proper under
 19 the Due Process Clause of the Fourteenth Amendment only where there are continuous and
 20 systematic contacts with the forum state (general jurisdiction), *Bauman v. DaimlerChrysler*
 21 *Corp.*, 579 F.3d 1088, 1094 (9th Cir. 2009), or when there are sufficient minimal contacts with
 22 the forum state such that the assertion of personal jurisdiction does not offend traditional notions
 23 of fair play and substantial justice (specific jurisdiction), *Int'l Shoe Co. v. State of Wash., Office*

25 ² Defendant Hero Nutrition did not file an answer or motion to dismiss.

1 *of Unemployment Compensation & Placement*, 326 U.S. 310, 316 (1945) (quoting *Milliken v.*
2 *Meyer*, 311 U.S. 457, 463 (1940)).

3 **1. General Jurisdiction**

4 To establish general personal jurisdiction, the plaintiff must demonstrate the defendant
5 has sufficient contacts to “constitute the kind of continuous and systematic general business
6 contacts that ‘approximate physical presence.’” *Glencore Grain Rotterdam B.V. v. Shivnath Rai*
7 *Harnarain Co.*, 284 F.3d 1114, 1124 (9th Cir. 2002)(quoting *Bancroft & Masters, Inc. v.*
8 *Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000), modified, *Yahoo! Inc. v. La Ligue*
9 *Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1207 (9th Cir. 2006)). Courts consider
10 such factors as whether the defendant makes sales, solicits or engages in business in the state,
11 serves the state’s markets, designates an agent for service of process, holds a license, or is
12 incorporated there. *Bancroft*, 223 F.3d at 1086. “[A] defendant whose contacts are substantial,
13 continuous, and systematic is subject to a court’s general jurisdiction even if the suit concerns
14 matters not arising out of his contacts with the forum.” *Glencore Grain*, 284 F.3d at 1123 (citing
15 *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n. 9, 104 S.Ct. 1868).

16 Mr. Barton submits that he is a resident of Utah and that he has not personally directed
17 any business activities to residents of the State of Nevada. (Barton Decl. at ¶¶2 & 5.) He claims
18 that to the extent he participated at all in any activities in the forum state it was in the service of
19 Hero Nutrition. (*Id* at ¶6.) Plaintiff does not adequately address why Mr. Barton’s activities
20 constitute “continuous and systematic” contacts with the forum state. The complaint only makes
21 generalized allegations that Defendants operate a website to promote and sell products to
22 Nevada residents. (Compl. at ¶19.) This is not enough to satisfy the Plaintiff’s burden to
23 establish personal jurisdiction. Instead, Plaintiff’s response focuses on the ability to establish
24 personal jurisdiction through Defendants’ website. Accordingly, the Court finds that general
25 personal jurisdiction has not been established by Plaintiff.

1 **2. Specific Jurisdiction**

2 The Ninth Circuit employ's a three-part test to determine whether the exercise of specific
 3 jurisdiction satisfies the requirements of due process: (1) the defendant must purposefully direct
 4 his activities or consummate some transaction with the forum or resident thereof; or perform
 5 some act by which he purposefully avails himself of the privileges of conducting activities in the
 6 forum, thereby invoking the benefits and protections of its laws; (2) the plaintiff's claim must
 7 arise out of that activity; and (3) the exercise of jurisdiction must be reasonable. *Dole Food Co., Inc.* v. *Watts*, 303 F.3d 1104, 111 (9th Cir. 2002).

8 **a. Purposeful Availment or Direction**

9 Under the first prong of the Ninth Circuit test the defendant must have either
 10 (1) "purposefully availed" himself of the privilege of conducting activities in the forum, or
 11 (2) "purposefully directed" his activities toward the forum. *Schwarzenegger v. Fred Martin*
 12 *Motor Company*, 374 F.3d 797, 802 (9th Cir. 2004). A purposeful availment analysis is most
 13 often used in suits sounding in contract while a purposeful direction analysis is most often used
 14 in suits sounding in tort. *Id.* Copyright infringement is often characterized as a tort; therefore,
 15 purposeful direction is the proper analytical framework for this case. *Brayton Purcell LLP v.*
 16 *Recordon & Recordon*, 606 F.3d 1124, 1128 (9th Cir.2010).

17 Purposeful direction is determined under the "effects" test of *Calder v. Jones*, 465 U.S.
 18 783, 789–90 (1983). "Under *Calder* the 'effects' test requires that the defendant allegedly has
 19 (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that
 20 the defendant knows is likely to be suffered in the forum state." *Schwarzenegger*, 374 F.3d at
 21 803. Cases following *Calder* have explained that the "effects" test is not satisfied merely by a
 22 foreign act with foreseeable effects in the forum; there must be "something more"-namely,
 23 "express aiming" at the forum state. *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d
 24 1082, 1087 (9th Cir. 2000) (citing *Calder*, 465 U.S. at 789).

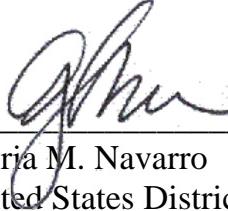
1 Plaintiff alleges that Defendants copied material from its website from a source
 2 assessable from Nevada and displayed the copied material on Defendants' website. (Compl. at ¶
 3 13.) The intentional act that Plaintiff alleges provides the basis for specific jurisdiction is the
 4 operation of the website. Plaintiff alleges that Defendant's content and website are
 5 "purposefully directed" and "purposefully targeted" at Nevada residents. (*Id.* at ¶¶14, 16.)
 6 Plaintiff alleges that Defendants' website is interactive because it sells products. (*Id.* at ¶ 19.)

7 Plaintiff fails to establish the third prong of the *Calder* effects test. To show foreseeable
 8 harm, a plaintiff must plead facts that establish that defendant's conduct caused harm that
 9 defendant knew was likely to be suffered in the forum. *Brayton Purcell*, 606 F.3d at 1131 (9th
 10 Cir. 2010). In *Brayton Purcell*, the Ninth Circuit held that the defendant's conduct caused harm
 11 that was likely to be suffered in the forum because the defendant knew that the plaintiff resided
 12 in the forum. *Id.* at 1131. Plaintiff does not allege any facts that would establish that Barton's
 13 operation of a website that is "targeted" at Nevada residents and sells products to Nevada
 14 residents would cause harm that is likely to be suffered in Nevada to a plaintiff that resides in
 15 Florida. To the contrary the alleged facts only lead to the conclusion that any harm would be
 16 suffered by the Plaintiff in Florida where it maintains its principal place of business.
 17 Accordingly, the Court finds that Plaintiff has failed to establish specific personal jurisdiction
 18 over Defendant David Barton.

19 **CONCLUSION**

20 **IT IS HEREBY ORDERED** that Defendant David Barton's Motion to Dismiss (ECF
 21 No. 9) is **GRANTED**. The Complaint is dismissed against Defendant David Barton for lack of
 22 personal jurisdiction.

23 DATED this 12th day of December, 2011.

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 Gloria M. Navarro
 United States District Judge